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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIE JAMES HARRELL, Defendant and Appellant.	E048227 (Super.Ct.No. SWF025561) OPINION

APPEAL from the Superior Court of Riverside County. F. Paul Dickerson III and Larrie R. Brainard,[1] Judges. Affirmed.

Linda Acaldo, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

[1] Retired judge of the San Diego Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

A jury found defendant Willie James Harrell guilty of criminal threats, a felony (Pen. Code, § 422)[2] (count 1) and brandishing a weapon, a misdemeanor (§ 417, subd. (a)(1)) (count 2).[3] After the trial court reduced count 1 to a misdemeanor, defendant was sentenced to three years' formal probation with various terms and conditions. Defendant's sole contention on appeal is that the trial court erred in denying his *Pitchess*[4] motion without an in camera hearing. We reject this contention and affirm the judgment.

I

FACTUAL BACKGROUND

Defendant resided with his fiancé, A.C., and her five children, K.F., K.T., K.C., N.W., and P.A. On May 18, 2008, defendant and A.C. got into an altercation over K.F.'s necklace. Defendant had found the necklace, was wearing it, and refused to return it.

Defendant was in the garage working on his car when A.C. confronted defendant about the necklace. Defendant and A.C. argued while K.F. and N.W. watched. The other children were also at home. During the argument, defendant grabbed a knife. While holding the knife, defendant threatened to cut A.C.'s throat, and he also threatened to

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[2] All future statutory references are to the Penal Code unless otherwise stated.

[3] The enhancement allegation that defendant personally used a deadly and dangerous weapon, to wit, a knife (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23)), in the commission of count 1, was found not true.

[4] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

"shoot" her. Defendant then picked up a rifle and rode away from the house on his bicycle.

K.F. believed the argument was serious. She was scared and called 911.[5] K.F. told the dispatcher that defendant "said he was gonna shoot my mom's head off and right now he said . . . he['s] gonna cut her throat off." K.F. also told the dispatcher that defendant left on a bicycle with a gun. She then hung up the telephone. The dispatcher called back and asked to speak with K.F.'s mother. A.C. spoke with the dispatcher. She told the dispatcher that defendant had threatened to cut her neck with a knife he was holding because she was trying to get her daughter's necklace back. She also stated that defendant laid the knife down, got on his bicycle, and then rode away with a rifle. A.C. further reported that a week before defendant had threatened to shoot her.

Riverside County Sheriff's Investigator Moody responded to the scene and interviewed A.C. She reported that she and defendant had argued about a necklace and that during the argument defendant had grabbed a knife from on top of a refrigerator in the garage. A.C. also stated that while holding the knife, defendant said, "'I'll cut your fucking throat and I'm going to shoot you in the head.'" She further asserted that defendant then grabbed a rifle, got on his bicycle, and rode away. She also reported that defendant was unpredictable and that she was afraid of him.

Investigator Moody also spoke with K.F., K.T., and P.A. K.F. reported that defendant was arguing with her mother about a necklace and that she saw defendant

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[5] The 911 tapes were admitted into evidence and played for the jury.

holding a knife and heard him tell her mother that he was going to "'slash [her] fucking throat.'" K.T. told Investigator Moody that defendant and her mother were arguing about a necklace and that defendant, while holding a knife, said, "'I'll cut your fucking throat open.'" P.A. stated that she saw defendant and her mother arguing and heard defendant say that he would cut and shoot her mother.

At trial, A.C., K.F., K.T., and P.A. essentially recanted their statements made to the dispatcher and Investigator Moody. A.C. characterized the incident as a misunderstanding and claimed that defendant was only using the knife to cut wire off of her car. She testified that she did not remember whether defendant had threatened her with a knife or telling the police that defendant had threatened her with a knife. She also claimed that she had lied to the 911 operator because she was angry and wanted to get defendant into trouble. She further explained that when the police arrived, she told them that her statements to the dispatcher were all untrue. A.C. admitted that in April 2006, defendant had choked her for two minutes during an argument, and she called the police. She was scared and could not breathe. She however told the police that she did not want to press charges because she did not want defendant to get into trouble.

K.F. denied telling the police that defendant had threatened to kill A.C. with a knife. P.A. could not recall police officers coming to her house or speaking with them on the day of the incident. She also could not remember the altercation between defendant and A.C. or telling the police that defendant told A.C. he was going to cut her neck and shoot her. K.T. also denied telling the police she had seen her mother and defendant having an argument about a necklace; or that she saw defendant with a knife in his hand;

or that she heard defendant tell her mother that he was going to cut her throat open. K.T. acknowledged that her mother told her she (K.T.) could help defendant, and if she (K.T.) did well in court, she (A.C.) would buy her a present. K.T. however clarified that her mother told her to tell the truth.

N.W. testified on behalf of the defense. She stated that she had overheard defendant, her mother, and her sister arguing in the garage over a necklace. She went into the garage a couple of times, but she never saw defendant with a knife or anything else in his hands. N.W. testified she did not hear any threats by defendant or feel defendant was a threat to anyone. She was not alarmed or concerned about the altercation. When the police came, N.W. testified that she heard her mother tell the officers that defendant never threatened her.

Defendant testified on his own behalf. He explained that he was in the garage working on his car, using a large steak knife to cut a vacuum hose and a wire, when A.C. confronted him about the necklace. Although he acknowledged arguing with A.C. and K.F. over the necklace, and cursing at them, he denied threatening A.C. or threatening to cut her neck with a knife. He also stated that he left on his bike with an antique rifle and went to a friend's house because he did not want the situation to escalate. Defendant admitted that he had choked A.C. in April 2006, but he claimed to do so after A.C. kicked and slapped him.

II

DISCUSSION

Defendant contends the trial court abused its discretion and deprived him of his constitutional rights when it denied his pretrial *Pitchess* motion without conducting an in camera review hearing.

Before trial, defense counsel filed a *Pitchess* motion seeking discovery of Investigator Moody's personnel file "discussing, mentioning, pertaining or relating to reports, complaints or investigations of: [¶] . . . [d]ishonesty, falsifying police reports, and false testimony." In a declaration by defense counsel, the motion alleged that Investigator Moody "falsified information given [to him]" in the police report based essentially on the ground that the victim had recanted her statements during the preliminary hearing. The motion included a copy of Investigator Moody's police report of the current incident.

The Riverside County Sheriff's Department opposed the motion. The department contended that the motion should be denied because there were at least three other corroborating witnesses, and defendant had not disputed that he committed the charged crimes and thus, failed to set forth a plausible factual foundation or good cause for the requested documents.

Following a hearing, the trial court denied the motion without conducting an in camera review of the requested documents, finding that defendant had failed to show good cause or present a plausible factual scenario of officer misconduct. The court explained, "The Court feels the request to open the deputy's record falls short of the

factual scenario of the officer's misconduct as plausible when read in light of the facts before the Court. For instance, if there was evidence that the defendant was not present, or that there were others within earshot of the conversation between the deputy and the victim who provided a sworn declaration that there's—nothing like that was ever said, or evidence before the Court that the conversation was taped and now somehow that tape is missing, so I think there needed to be much more of a factual foundation to show that, you know what, this really is plausible."

In *Pitchess*, *supra*, 11 Cal.3d 531, the court held that a criminal defendant could "compel discovery" of certain information in police officer personnel files by demonstrating good cause. Good cause is demonstrated by making "general allegations which establish some cause for discovery" of the information and by showing how it would support a defense to the charge against him. (*Id*. at pp. 536-538.)

In 1978, the Legislature codified the holding in *Pitchess* by enacting Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81 (*Santa Cruz*).) To initiate discovery of such records, a defendant must file a written noticed motion supported by affidavits showing "good cause for the discovery or disclosure sought, setting forth the materiality" of the information to the pending litigation and "stating upon reasonable belief" that the police agency has the records or information sought. (Evid. Code, § 1043, subd. (b)(3); see also *Santa Cruz*, at p. 82.)

This two-part showing of good cause is a "relatively low threshold for discovery . . . ." (*Santa Cruz*, *supra*, 49 Cal.3d at p. 83.) Once the trial court finds good

cause has been established, it must examine the records "in chambers" and disclose only those records and information that are relevant and not subject to exclusion from disclosure. (Evid. Code, § 1045, subds. (a) & (b); see also *People v. Thompson* (2006) 141 Cal.App.4th 1312, 1316 (*Thompson*).)

Here, having found defendant failed to establish good cause, the trial court declined to hold an in chambers examination of the information. Defendant contends he made an adequate showing of good cause. We disagree.

The trial court is granted wide discretion when ruling on a motion to discover police officer records (*People v. Memro* (1995) 11 Cal.4th 786, 832), and we review that ruling for abuse of discretion. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039; see also *People v. Mooc* (2001) 26 Cal.4th 1216, 1228).

The California Supreme Court has clarified a defendant's burden of proof in establishing the first part of the good cause requirement. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016 (*Warrick*).) In order to show materiality, the defendant must show "a logical link between the defense proposed and the pending charge . . . [and] articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events." (*Id*. at p. 1021.)

In establishing the necessary link, counsel's declaration must propose a defense to the pending charge that is factually plausible and articulate how the discovery sought may lead to relevant evidence or be admissible as direct or impeachment evidence. (*Warrick, supra,* 35 Cal.4th at p. 1024.) A factually plausible scenario is one that "might or could have occurred." (*Id*. at p. 1026.) The trial court then determines "whether

defendant's averments, '[v]iewed in conjunction with the police reports' and any other documents, suffice to 'establish a plausible factual foundation' for the alleged officer misconduct and . . . 'articulate a valid theory as to how the information sought might be admissible' at trial." (*Id*. at p. 1025.) This inquiry is made by asking the following questions: (1) Has the defense made a logical connection between the charges and the proposed defense? (2) Was the affidavit supporting the motion factually specific and tailored to support its claim of officer misconduct? (3) Will discovery of the requested information support the proposed defense, or is it likely to lead to information that would support the proposed defense? (4) Under what theory is the requested information admissible? (*Id*. at p. 1027.)

In *Warrick*, the defendant was charged with possessing cocaine base for sale. Three officers, patrolling an area known for violent crime and narcotics activity, observed the defendant standing next to a wall looking at a clear plastic baggie he was holding that contained off-white solids. When the officers exited their patrol car, the defendant fled, throwing numerous pieces of a substance resembling rock cocaine. One officer retrieved 42 lumps from the ground, and the defendant was arrested, at which time he was found to be in possession of an empty baggie and $2.75 in cash. He filed a *Pitchess* motion seeking disclosure of previous citizen complaints against the three arresting officers for making false arrests, falsifying police reports, or planting evidence. In support of his motion, he submitted an affidavit that stated his version of the events, namely, that when the officers exited their car, he fled, fearing arrest for an outstanding warrant. He was at the scene to buy cocaine from a seller who was also there, and it was the seller who

tossed the cocaine as defendant ran past him. The court found the defendant had made a sufficient showing of good cause to entitle him to an in chambers record review by the trial court. (*Warrick*, *supra*, 35 Cal.4th at pp. 1016-1018, 1024, 1027.)

In *Thompson*, *supra*, 141 Cal.App.4th 1312, the Court of Appeal found the defendant's factual scenario insufficient because it was "not internally consistent or complete," "[c]ounsel's declaration simply denied the elements of the offense charged," and the defendant did not "present a factual account of the scope of the alleged police misconduct [nor] explain his own actions in a manner that adequately support[ed] his defense." (*Id*. at p. 1317.) The defendant in *Thompson*, who was arrested for selling drugs to an undercover officer and receiving marked money in exchange, said he did not sell drugs or receive marked money and that the arresting officers fabricated the alleged events using narcotics already in their possession to frame the defendant and cover up their own mishandling of the situation. (*Ibid*.) The appellate court found the defendant's scenario insufficient in that he gave no nonculpable explanation for his presence in a popular drug selling area, offered no factual basis for being singled out by police, and gave no further information about the police's alleged mishandling of the situation. (*Ibid*.) The *Thompson* court distinguished *Warrick*, in which the defendant "did not merely make bald assertions that denied the elements of the charged crime" but "provided an alternate version of the events" through a specific factual scenario that explained the facts set forth in the police report. (*Thompson*, at p. 1318.)

Applying these principles, we find defendant failed to show good cause for discovery of Investigator Moody's personnel file. Defendant failed to establish a link

between the charges and the proposed defense and the relevancy of the alleged misconduct to that defense. In his declaration, defense counsel declared that the victim had denied making disparaging statements that were included in Investigator Moody's police report about defendant at the preliminary hearing and, therefore, Investigator Moody "falsified" the police report. In his declaration, however, counsel never stated that defendant never threatened the victim with a knife or that defendant never had a knife in his possession. Therefore, defense counsel's declaration failed to establish "a logical link between the defense proposed and the pending charge . . . [and] articulate how the discovery . . . would support such a defense or how it would impeach the officer's version of events." (*Warrick*, *supra*, 35 Cal.4th at p. 1021.) Defense counsel's declaration is conclusory because it fails to articulate any defense to the charges or show how the Investigator Moody's alleged acts of dishonesty are connected to that defense.

Additionally, like the defendant in *Thompson*, defendant did not set forth a specific, alternate factual scenario that was plausible in light of the pertinent documents. The declaration fails to explain how or why Investigator Moody committed the alleged falsification of the police report, or explain what the victim actually reported to Investigator Moody. The declaration further fails to provide an account of what actually occurred in the garage or what was actually reported to Investigator Moody when he responded to the 911 call on the day of the May 18, 2008, incident. The declaration is devoid of any statement setting forth any factual scenario that could or might have happened. While defendant generally raised denial to the charges, the declaration does not identify, factually or categorically, the defense. Instead, counsel alleged that

Investigator Moody's version of events in the police report is contrary to that of the defense. Moreover, the allegations in counsel's declaration are not internally consistent or plausible. The declaration notes that at the preliminary hearing the victim denied telling Investigator Moody that defendant threatened her by saying, "'I'll cut your fucking throat, and I'm going to shoot you in the head.'" However, the declaration does not state that the victim denied reporting that she argued with defendant about a necklace, that defendant grabbed a knife and a gun, or that she was afraid of defendant. Furthermore, the declaration does not assert that Investigator Moody falsified the statements of the three other witnesses to the crime, each of whom gave similar accounts of defendant threatening to cut the victim's throat and shoot her in the head. Thus, the declaration lacked the requisite specificity for an in camera review of Investigator Moody's personnel records.

As such, we find the trial court did not abuse its discretion in concluding that defendant did not meet the standard for permitting discovery of information from police personnel files. Moreover, given the evidence presented in this case, even were we to find that the trial court erred in finding that defendant had made no showing of good cause to support his *Pitchess* motion, defendant has not shown "there was a reasonable probability that the outcome of the case would have been different had the information been disclosed to the defense." (*People v. Hustead* (1999) 74 Cal.App.4th 410, 422.) Such error would be harmless in light of all the other evidence linking defendant to the crimes of which he was convicted. (See *People v. Samuels* (2005) 36 Cal.4th 96, 110.)

III

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

KING
J.